FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 277

THE AUTOMATIC DEVICES CORPORATION,
Petitioner,

vs.

SINKO TOOL & MANUFACTURING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Automatic Devices Corporation, prays that a writ of certiorari should issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered April 27, 1940 (R. 517).

A certified transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith, in compliance with Rule 38 of the Rules of this Court.

Summary Statement of the Matter Involved.

This is a suit brought by petitioner against respondent for infringement of petitioner's Mead Patent No. 1,736,544, issued November 19, 1929; Johnson Patent No. 2,129,374, issued September 6, 1938; and Cohen Patent

No. 2,140,311, issued December 13, 1938. The patents all relate to automatic wireless cigar lighters now practically universally used in automobiles, the Mead patent being the primary one in this field, and the Johnson and Cohen patents being for specific improvements thereon.

The District Court for the Northern District of Illinois, Eastern Division, held Claims 2, 3 and 11 of the Mead patent valid and infringed, and typical Claims 1 and 4 of the Johnson patent, and 3, 15 and 24 of the Cohen patent, invalid, as not involving invention over the earlier Mead patent (R. 241, 262).

The Court of Appeals for the Seventh Circuit reversed the decree of the District Court as to the Mead patent and held the latter invalid and not infringed, and affirmed as to the Cohen and Johnson patents.

This petition is directed to a review of the decision of the Court of Appeals as to the Mead and Cohen patents.

Jurisdiction.

1. This is a suit arising under the Patent Laws of the United States, Judicial Code, Sec. 24 (7) (28 U. S. C. Sec. 41 (7)).

2. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

3. The date of the decree which petitioner seeks to have reviewed is April 27, 1940 (R. 517). The petition for rehearing was denied June 18, 1940 (R. 564).

Questions Presented.

The decision of the Circuit Court of Appeals for the Seventh Circuit presents the following questions:

1. Whether Claims 2, 3 and 11 of the Mead patent

could properly be held invalid by the Court of Appeals in view of the fact that respondent (defendant) had admitted in the District Court that it had abandoned the defense of invalidity and that its defense was directed solely to noninfringement.

2. Whether the Cohen patent was properly held invalid, particularly on the ground that certain of the Cohen claims were added and a new preamble of the specification was substituted after the accused cigar lighters had been placed upon the market.

3. Whether Claims 2, 3 and 11 of the Mead patent and Claim 3 of the Cohen patent are infringed by the cigar lighters made and sold by respondent, the Court of Appeals having held, in effect, that infringement was avoided because in the accused cigar lighters, only part of the plug, in distinction to the entire plug, is moved to close the electric circuit.

Reasons for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. That the decision of the Court of Appeals holding the claims of the Mead patent invalid after the defense of invalidity had been abandoned in the District Court is in apparent conflict with the decisions of this Court and those of other Courts of Appeal to the effect that after a defense has been abandoned or waived by a defendant in the lower Court, such defense is not available in an Appellate Court.

2. That an important question of federal law which has not been, but should be, settled by this Court is presented, as to whether a patent application may be amended by the substitution of a new preamble and the presentation of new claims after a defendant's accused

device had been placed upon the market, provided such preamble and claims are supported by the disclosure of the application as filed.

3. That the decision of the Court of Appeals was in apparent conflict with decisions of this Court on the question of infringement.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted.

DRURY W. COOPER,
THOMAS J. BYRNE,
HENRY M. HUXLEY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, was filed June 28, 1939 (R. 239), and amended by memorandum filed July 11, 1939 (R. 255). It has not been reported.

The opinion of the Circuit Court of Appeals for the Seventh Circuit was filed April 27, 1940 (R. 502) and was amended by an order entered June 18, 1940 (R. 563). As amended, it is reported in 112 Fed. (2d) 335.

Jurisdiction.

Note petition (*Supra*, p. 2).

Statement of the Case.

The essential facts of the case are stated in the accompanying petition for writ of certiorari, and in the interest of brevity are not repeated here.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is issued are that the Circuit Court of Appeals for the Seventh Circuit erred:

1. In failing to hold that respondent was precluded from urging the defense of invalidity of the Mead patent after this defense had been abandoned in the District Court.

2. In failing to hold that Claims 3 and 14 to 26 inclusive (of which Claims 3, 15 and 24 are typical) of the Cohen patent in suit are valid.

3. In holding the claims of the Cohen patent invalid on the ground that a new preamble and certain claims were added to the Cohen application after respondent's accused cigar lighters had been placed upon the market.

4. In holding that the Cohen patent was invalid for lack of novelty.

5. In holding that Claims 2, 3 and 11 of the Mead patent, and Claim 3 of the Cohen patent were not infringed.

SUMMARY OF ARGUMENT.

1. The respondent was precluded from urging the defense of invalidity of the Mead patent after abandoning this defense in the District Court.

2. The amendment of the preamble of the Cohen patent and the addition of specific claims after the respondent's accused devices were placed on the market were not a proper ground for holding the Cohen patent invalid, as both the preamble and claims were supported by the original disclosure of the Cohen application as filed.

3. The Court of Appeals was not justified in holding the Cohen claims invalid for lack of novelty, this holding having originally been based upon an incorrect understanding of the structure involved.

4. The holding of non-infringement of the Mead patent and Claim 3 of the Cohen patent was not justified.

ARGUMENT.

Point I.

After the District Court had filed its memorandum opinion on June 28, 1939 (R. 239), sustaining the validity of the Mead patent and holding that the petitioner was entitled to a decree in respect thereto, the respondent filed a petition for rehearing, in which it stated (R. 244):

> "* * * The principal and primary defense as to the Mead patent, as will be clear from defendant's briefs, was non-infringement and *we did not urge that the patent be held invalid for lack of invention.* Plaintiff, on the other hand, gave the mistaken impression that defendant was merely taking the position that there could be no invention in the use of a thermostat with a cigar lighter because it is old to use thermostats in other types of heating appliances. *At no time was this defendant's contention.*
>
> "On page 8 of plaintiff's brief it is stated: 'We cannot see that defendant has made any sound argument leading to a logical conclusion of invalidity in the present case.' *This statement is true so far as the Mead patent is concerned because our argument was on non-infringement and not invalidity.*" (Emphasis ours.)

By the above quoted statement, respondent admitted the validity of the Mead patent, and not only at that time waived the defense of invalidity, but admitted that it had at no time urged this defense, which had been pleaded by respondent's Answer.

Under these circumstances, both parties were in agreement that the District Court correctly held the Mead claims valid, and on this score there was nothing for the Court of Appeals to review, since the respondent could not in the Court of Appeals raise a defense which it had abandoned in the District Court.

As succinctly stated in *Arkansas Anthracite Coal & Land Co.* v. *Stokes* (C. C. A. 8), 2 Fed. (2d) 511, 515:

> "* * * In short, to state the rule simply and baldly, the theory on which a case is tried *nisi* is the theory on which it must, on appeal, be weighed for error."

The same principle is laid down in—

Perego v. *Dodge*, 163 U. S. 160, 166.

Virginian Ry. v. *Mullens*, 271 U. S. 220, 227.

United States National Bank of New York v. *First National Bank of Little Rock, et al.* (C. C. A. 8), 64 Fed. 985, 992.

It is therefore submitted that the defense of invalidity on the Mead patent was one which was not properly before the Court of Appeals after respondent's abandonment of this defense.

Under these circumstances for the Court to have held the Mead patent invalid is in apparent conflict with the decisions of this Court and those of other Courts of Appeal and should be corrected.

Point 2.

The question as to whether a patent application may properly be amended by the substitution of a new preamble and the addition of certain claims after a competitive device has been placed upon the market, and provided that such preamble and claims are supported by the disclosure of the application as filed, presents an important question which so far as we have been able to discover has not been passed upon by this Court.

It is, of course, immediately conceded that if "new matter" is introduced into a patent application during its prosecution, so that there is a change made in the appa-

ratus disclosed, such "new matter" would at least render invalid any claims based upon it. This, however, is not the situation in the present case.

From the drawings and description of the Cohen patent (R. 296 ff; see also Sheet 2 at end of brief), it clearly appears that in the socket of the cigar lighter there is a spring controlled thermostatic switch, which is moved to circuit closing position when the plug or igniter unit is moved from open circuit position, shown in Figs. 1 and 8 of the patent and Fig. B of Sheet 2, to circuit closing position, shown in Figs. 2 and 9 of the patent and Fig. C of Sheet 2.

It is apparent that the cigar lighter as a whole consists of two main parts, namely, the removable igniter unit or plug, and the holding device, the latter always being permanently fastened in position. (Note Fig. A of Sheet 2.)

Since in the Cohen patent the thermostatic fingers and spring making up the thermostatic switch are in one of these two main parts of the cigar lighter, it is obvious that after the parts, such as the spring and thermostatic fingers, are calibrated with respect to each other, which is a necessity of manufacture, any plug or igniter unit could be placed in any holding device without special calibration between each holding device and the plug therefor, which would be necessary if the spring of the switch, for example, were carried by the plug, and the thermostatic fingers were carried by the holding device.

Although the Cohen cigar lighter was completely disclosed in the application as filed, the advantages of interchangeability of plugs and holding devices were not pointed out in the specification. It is well established, however, that a patentee is entitled to all of the advantages of his invention whether or not he points out these advantages in his specification, so long as he has disclosed

the construction which would inevitably give the advantages.

Stow v. *Chicago*, 104 U. S. 547, 550.
Corona Co. v. *Dovan Corp.*, 276 U. S. 358, 369.
Radio Corp. v. *Radio Laboratories*, 293 U. S. 1, 14.
Lyon, et al. v. *Boh, et al.* (C. C. A. 2) 10 Fed. (2d) 30, 34.

In the present instance the substituted preamble did not change the disclosure one iota, but simply pointed out the advantages of the feature clearly disclosed in the original application, to wit, having the entire thermostatic switch in one of the two main members of the cigar lighter. Similarly, the claims which were added after the accused device had come upon the market were directed to having the entire thermostatic switch in one of the two main parts of the cigar lighter. This is what Cohen had when he filed his application and the mere fact that the advantage of this detail of construction was not previously pointed out and was not specifically claimed (the original Cohen claims having been more broadly directed to his invention), should not, it is submitted, affect Cohen's right to this specific feature of his invention fully disclosed in his application as originally filed, merely because the accused device had been placed on the market before the specific claims were made.

The Court of Appeals for the Seventh Circuit itself apparently decided this very question in its own earlier decision in *American Steel Foundries* v. *Damascus Brake Beam Co.*, 267 Fed. 574, 577, in which it stated:

> * * * It is, however, claimed that certain elements in the product patents and steps in the process patent were added after patentee observed appellant's commercial structure. We have examined the specifications and the file wrapper, and find some of these

charges are disproved by the record, while the others must be rejected, *because the specifications and drawings in the original application were sufficient to support all the amendments that were subsequently made.*" (Emphasis ours.)

In the instant case, however, the Court departed from the principle thus set forth, relying principally upon the decisions of this Court in—

Railway Company v. *Sayles*, 97 U. S., 554.
Hobbs v. *Beach*, 180 U. S., 383.

In *Railway Company* v. *Sayles*, the patentee Tanner, five years after filing his original application, filed an amended application and a new model, and the Court held that if these "embodied any material addition to or variance from the original,—anything new that was not comprised in that,—such addition or variance cannot be sustained on the original application."

This was quite evidently a case in which it was attempted to change the disclosure of the application and was not one in which there was merely an amplified statement of advantages and the addition of claims clearly based on the original disclosure.

Again, in *Hobbs* v. *Beach*, 180 U. S., 383, a reissue patent was involved, which was held valid and infringed. The argument was made that the original specification and claims had been expanded to cover the defendant's machine. This argument was not sustained. The previous decision of *Railway Company* v. *Sayles* was cited, and the Court incidentally remarked that if the specification and claims had been expanded in view of the defendant's machine, the doctrine of *Railway Company* v. *Sayles* would have been applied. This, however, simply means that if the disclosure of the application, in distinction to a mere statement of advantages, had been

changed, as in *Railway Company* v. *Sayles*, then the doctrine of that case would have been applied.

There is no decision by this Court so far as we are aware which goes to the extent of holding that at any time an application cannot be amended, as, for example, by substitution of a new preamble more completely stating the objects and advantages of the invention, provided this is based upon the original disclosure, and the same is true as to the addition of claims, such as typical Claims 15 and 24 in the present instance, which are obviously much narrower and more specific than Claim 3, which appeared in identical form in the application as filed.

This presents a very important question which should be decided by this Court, since if the decision of the Court of Appeals for the Seventh Circuit should stand, it would introduce into the Patent Law a precedent which would greatly restrict the amendment of applications during their prosecution, with the results that an inventor, merely because a competing device had succeeded his own on the market, might thereafter lose his right to specific features of his own invention, possibly merely through the inadvertence of the claim writer, and the public might be deprived of a clearer statement of the objects and advantages of the invention as distinguished from the prior art, of which practically every patentee obtains a more complete actual knowledge during the prosecution of his application.

Point 3.

In the Court of Appeals' opinion as originally filed April 27, 1940, the description of the "second feature" of the Cohen patent (R. 514) was quite incorrect, in that it stated that one part of the thermostatic switch member was in the socket and another part on the removable plug.

The conclusion of invalidity on account of lack of novelty was principally based upon this incorrect understanding of the Cohen construction. The error was not only pointed out in petitioner's petition for rehearing (R. 525, 538), but was also agreed to by respondent in its answer to the petition for rehearing (R. 557, 558), whereupon the Court amended its opinion (R. 563), but did not change its conclusion, and even in a portion of the amended opinion (R. 515) incorrectly implied that the claims dealing with the so-called "second feature" were not supported by the original disclosure.

The claims under discussion simply state in effect that the thermostatic switch is carried solely by one of the two main members of the cigar lighter. Obviously, such claims are readable upon the original disclosure because the entire thermostatic switch is shown as being carried solely in the holding device of the cigar lighter, which is one of the two main parts, to wit, the holding device and the plug or igniter unit, as shown in Fig. A of Sheet 2 at the end of this brief.

Had the Court originally correctly understood the Cohen construction, there would have been no proper basis for a holding of invalidity on the ground of lack of novelty as to any of the claims, for no prior art shows a thermostatic switch contained solely in one of the two main parts of the cigar lighter, nor, as provided in Cohen's Claim 3, was there any prior art in which the plug of an automatic wireless lighter was given longitudinal movement for closing the circuit by arranging the thermostatic fingers in co-axial alignment with the plug.

Point 4.

In connection with the question of infringement of the Mead Claims and the Cohen Claim 3, the following is a brief description of the structures involved:

In Mead's specific embodiment of his invention, as shown on Sheet 1, the igniter unit or plug (shown as completely removed in the right-hand part of Fig. A) in its normal position is carried by a rotatable socket 41, which is part of the holding device. The contact 75 of the plug is out of engagement with the spring terminal 53 of the holding device, as shown in Fig. B.

To close the circuit, the plug is rotated by its handle 61, which at the same time rotates the socket 41 so that (as shown in Fig. C) the contact 75 engages the spring detent terminal 53, thus holding the plug in its circuit closed position.

When the igniter resistance coil 83 becomes heated to the proper temperature for use, the heat from this coil acts on the bimetallic spring member 54, or the bimetallic coil spring 47, or both, so that the holding action of the spring 54 is weakened or the torsional force of the spring 47 is increased, thus causing the plug to be automatically moved from the position shown in Fig. C to that shown in Fig. B. By this action the contact 75 is removed from engagement with terminal 53 and the circuit is opened, whereupon the plug as a whole is removed for lighting a cigar.

In the Cohen patent (see Sheet 2), the plug is longitudinally moved to the left from the position shown in Fig. B to that shown in Fig. C in order to close the circuit by bringing the thermostatic fingers 32′ into engagement with the "collar button" contact 45′.

When the igniter coil 54 reaches the proper temperature, its heat causes the thermostatic fingers 32′ to expand away from each other so that the spring 48 causes the parts, including the plug, to move to the right into the position shown in Fig. B, ready for removal and use of the plug for lighting a cigar.

In the respondent's accused device (identically shown on Sheets 1 and 2), for closing the circuit the knob 61, plate 18, sleeve 19 and contact 20 are moved to the left against the tension of the spring 17 from the position shown in Fig. B to that shown in Fig. C. The contact 20 thus engages the thermostatic fingers 21, closing the circuit. When the igniter coil 83 reaches the proper temperature for use, its heat causes the thermostatic fingers 21 to move away from each other and the parts move back to the position shown in Fig. B by the action of spring 17, whereupon the igniter unit as a whole is ready for removal and use.

It will be apparent from the foregoing description that the essential movement of the plug or igniter unit is to bring its circuit closing contact into engagement with another contact so that the circuit is closed.

In the illustrated embodiments of Mead and Cohen, it happens that literally the entire plug is moved to effect this movement of the circuit closing contact, whereas in the accused device only part of the entire plug is so moved. It was on this ground that the Court of Appeals held Mead's Claims and Cohen's Claim 3 dealing with Cohen's so-called "first feature", as not infringed.

As stated in the opinion (R. 514):

> "With respect to the first feature we think it is obvious that defendant does not infringe the Cohen patent. It is true that the circuit is closed in each by a movement longitudinal of the plug, but as stated in our discussion of Mead, who used the rotary move-

> ment, *a mere longitudinal movement of the defendant's push button in the center of his plug,* after the plug has come to rest and the contacts are all made, *is not the equivalent of moving the entire plug in order to close the circuit.*" (Emphasis ours.)

None of the claims is limited to moving the *entire* plug, and precisely the same function is performed in the accused device, where only part of the plug is moved to circuit closing position, as in the Mead and Cohen patents, where it happens that in the illustrated embodiments of the inventions the entire plug is so moved.

It was old even prior to Mead to close the circuit in a non-automatic wireless cigar lighter either by movement of the entire plug or a part of the plug (Finding of Fact 6, R. 257). It was not of the gist of either Mead's or Cohen's invention as to which of these known methods was used. Their inventions were directed to the combinations set forth in the claims and these combinations and the cooperating functioning of the various elements were precisely the same whether the whole plug or part of it was moved to circuit closing position.

In regard to Mead, for example, the District Court held (R. 241):

> "* * * Mead was the first in this country to produce an automatic device in which the members were brought into the proper connection and held there until the igniting unit was properly ignited and the connection was then automatically broken. The essential features of the device, as it appears to me, were the combination of the spring and the thermostatic device in a cigar lighter and this combination I think revealed invention."

It cannot be disputed that the Mead patent was the first one in the art which disclosed an automatic wireless cigar lighter, the very extensive sales of which by petitioner's licensee, Casco Products Corporation, have prac-

tically displaced the old manually operated type, in spite of a higher selling price (R. 71, 72).

To hold that the Mead claims and Cohen's Claim 3 are not infringed because in the accused cigar lighters the *entire* plug is not moved when the circuit is closed is directly contrary to the well established law as laid down in decisions such as

Machine Company v. *Murphy*, 97 U. S., 120, 125.

Sanitary Refrigerator Company v. *Winters et al.*, 280 U. S., 30, 42.

Pedersen v. *Dundon* (C. C. A. 9), 220 Fed., 309, 311.

Line Material Company v. *Brady Electric Mfg. Co.* (C. C. A. 2), 7 Fed. (2d), 48, 50.

Conclusion.

For the reasons above stated it is urged that the petition for writ of certiorari be granted.

Respectfully submitted,

Drury W. Cooper,
Thomas J. Byrne,
Henry M. Huxley,
Counsel for Petitioner.

July 22, 1940.

MEAD PATENT No. 1,736,544

FIG. A.

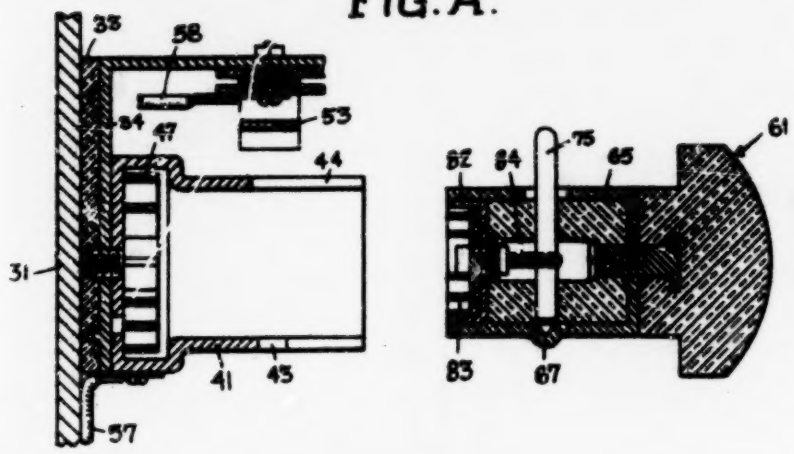


FIG. B.

"OFF" POSITION

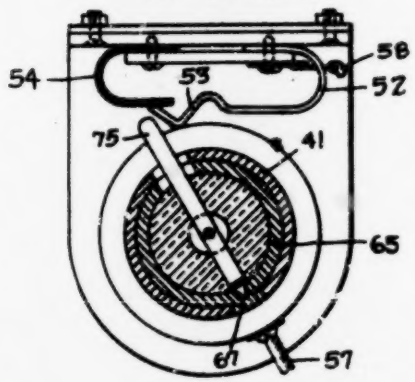
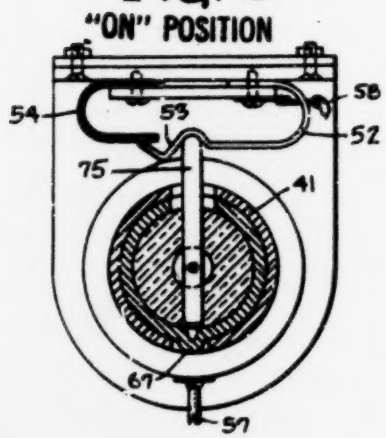


FIG. C.

"ON" POSITION



DEFENDANTS ACCUSED DEVICE

FIG. A.

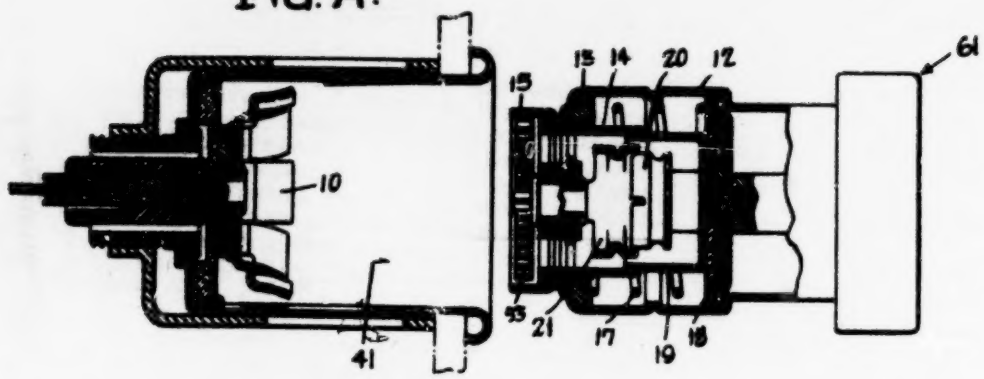


FIG. B.

"OFF" POSITION

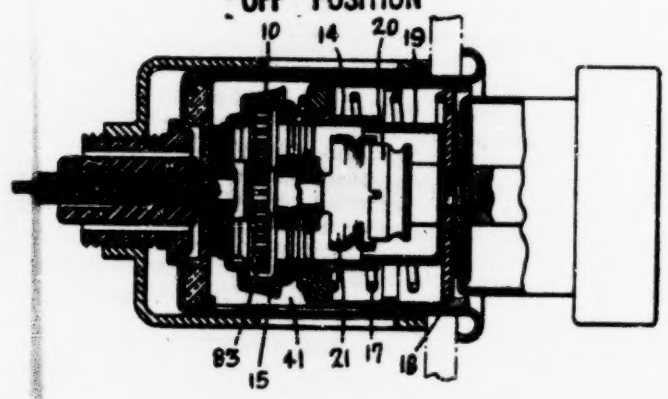
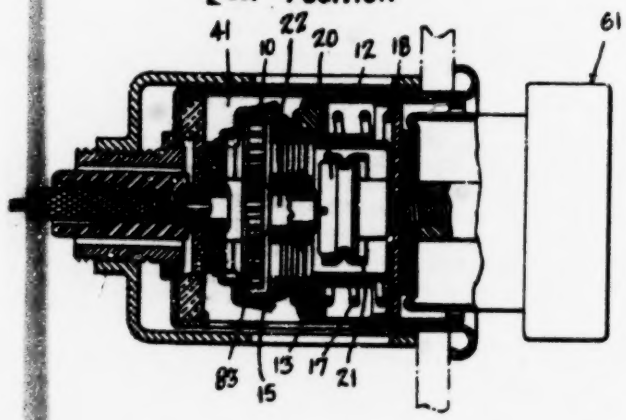


FIG. C.

"ON" POSITION



SHEET-1

TYPICAL MEAD CLAIMS

2. In a device of the class described. a removable heating member having an electrical heating unit, a socket for receiving and holding said heating member, electrical current supply terminals, means for moving said heating member to a position for establishing an energizing circuit to said heating unit, and means responsive to the temperature of said heating unit for interrupting said energizing circuit.

3. In a lighting device for cigars and the like, a removable heating member having an electric heater, a support for receiving and holding said heating member, current supply terminals on said support, said heating member being movable on said support to a position where said heating unit is energized from said terminals and means responsive to the temperature of said heating unit for controlling the heating thereof.

11. In an electric lighter of the class described, a base member, a heater member movably mounted on said base member, an electric heater on said heater member, electrical supply terminals on said base member, said heater member being movable between an energized position where a circuit is established from said terminals to said heater, and an off position where said circuit is interrupted, and automatic means for withdrawing said heater member from the on position to the off position upon heating of said heater.

FIG. A. COHEN PATENT No. 2,140,311

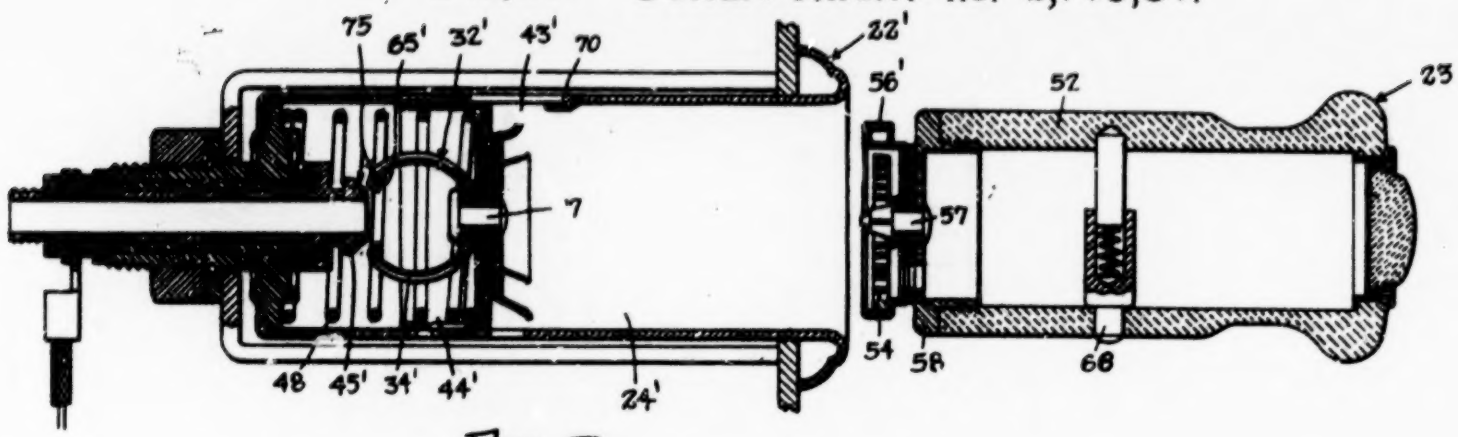


FIG. B.
"OFF" POSITION

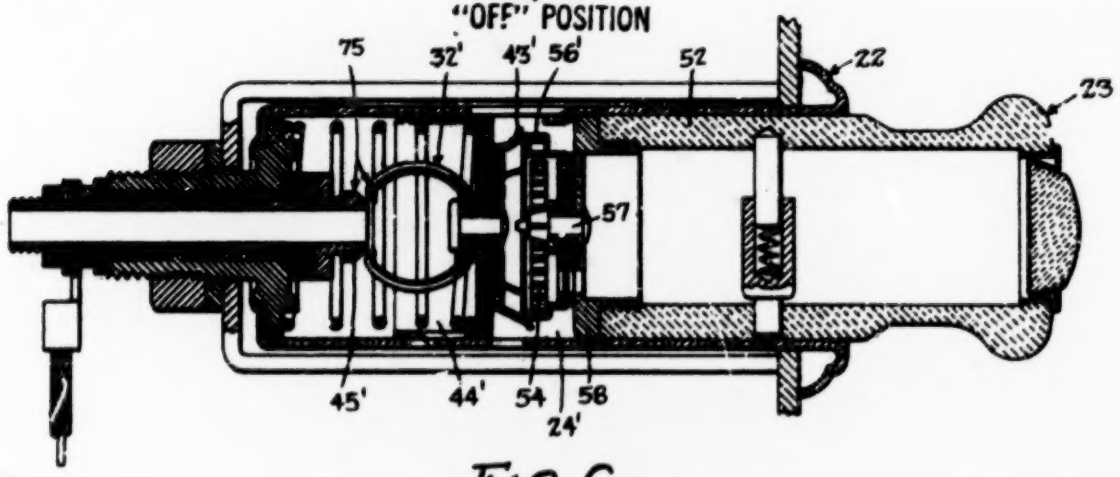
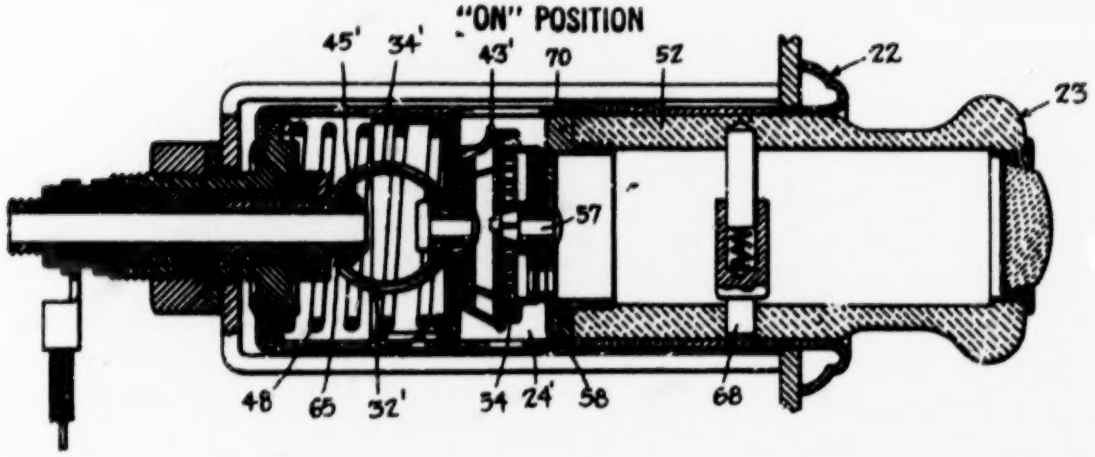


FIG. C.
"ON" POSITION



DEFENDANT'S ACCUSED DEVICE

FIG. A.

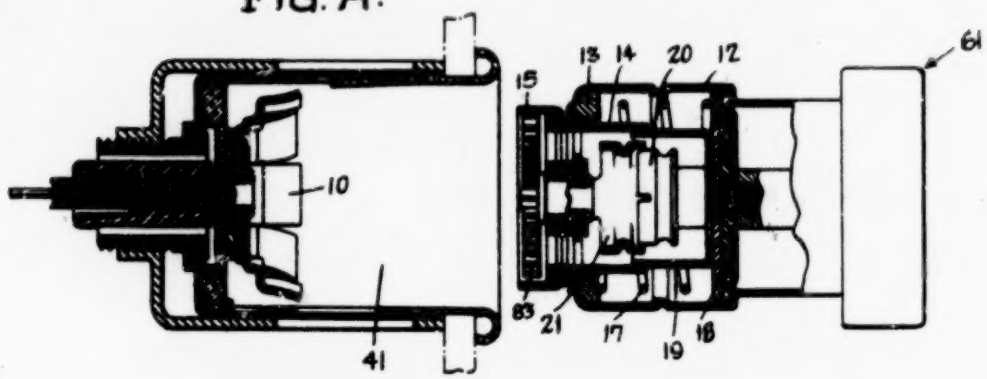


FIG. B.
"OFF" POSITION

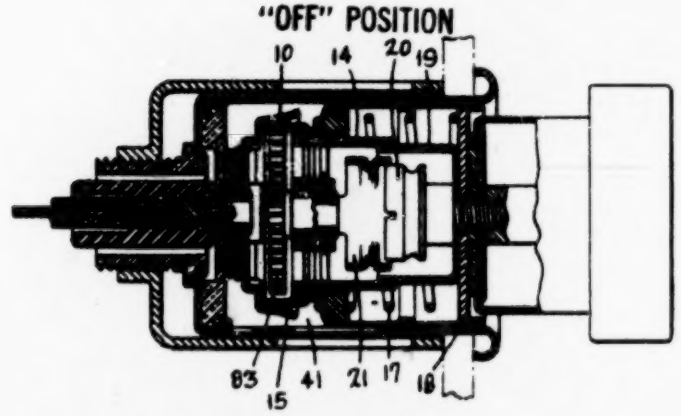
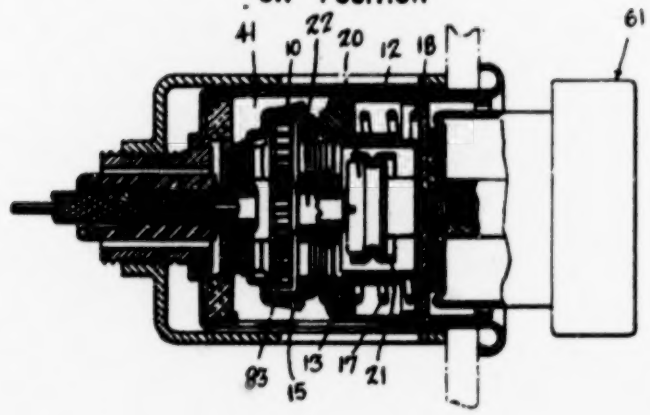


FIG. C.
"ON" POSITION



DEFENDANTS' ACCUSED DEVICE

FIG. A.

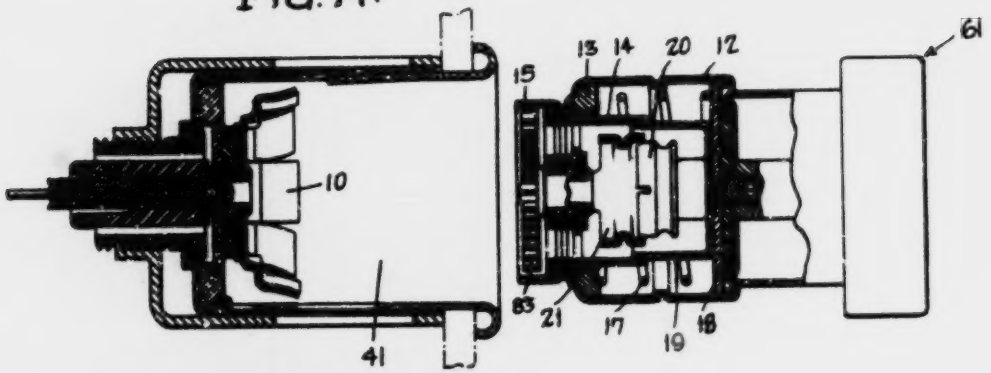


FIG. B.

"OFF" POSITION

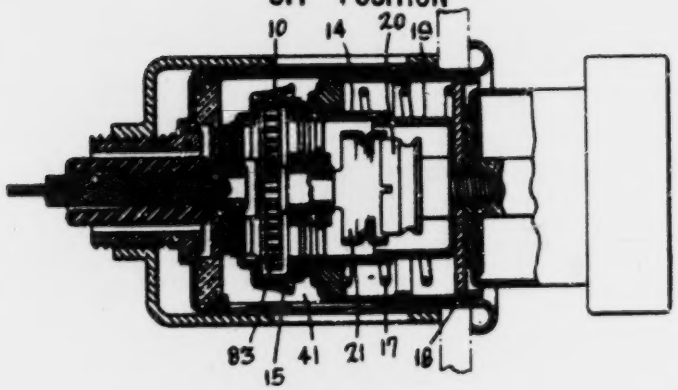
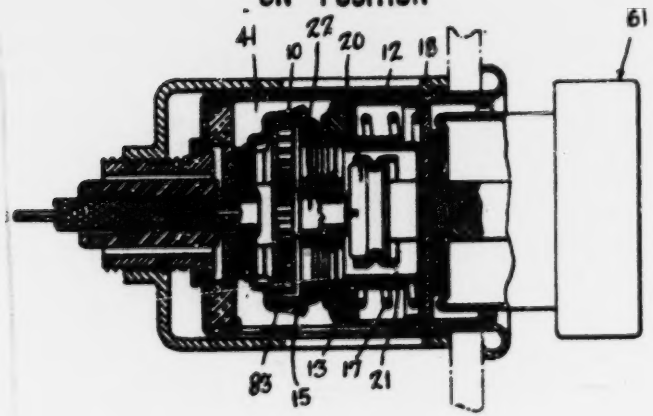


FIG. C.

"ON" POSITION



TYPICAL COHEN CLAIMS

3. In an electric cigar lighter, the combination of a base member; a socket on the base member; a plug removably mounted in the socket and longitudinally movable in said socket to a shallow inoperative position and into a deep operative position; a heating coil on said removable plug; means adapted to move the removable plug in the socket from the deep operative position to the shallow inoperative position preparatory to removal and use; and thermal responsive means in axial alignment with the plug for restraining said last-named means until the heating coil reaches a predetermined temperature.

15. A cigar lighter having two parts one constituting a holding device and the other constituting an igniting unit removably supported by the holding device and having a heating element thereon, one of said parts having a pair of relatively movable members; means for normally urging the members apart; cooperating circuit-closing means mutually carried by the members; manually operable means for moving said members toward one another into position to close a circuit through the heating element, said circuit-closing means including heat-responsive means in heat-receiving relation with the heating element for opening the circuit when the heating element has attained its desired usable heat; and auxiliary contact means to close said circuit when the heat-responsive means is in open-circuit position and said parts are held together manually.

24. A cigar lighter having two completely separable parts, one being a holder and the other an igniting unit supported by the holder but removable therefrom for use and carrying a heating element; means for feeding energising current to the heating element including cooperating contacts on the holder and igniting unit; a switch having relatively movable contacts, manually operated means for closing said switch; and thermostatically controlled means associated with said switch and in heat-receiving relation with the heating element for causing the switch to be opened when the heating element is ready for use and to remain open until the next operation of said manually operated means, said switch and thermostatically controlled means being entirely carried by solely one and the same of the said two parts of the cigar lighter, so as to remain in predetermined operative relation relative to each other in a single operative assembly irrespective of the interchange of said igniting unit or holding device with other like igniting units or holding devices.